MOTION FILED
FEB 22 1991

(5)

No. 90-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF GAS CONSUMERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A *WRIT OF CERTIORARI*

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MOTION OF NATIONAL ASSOCIATION OF GAS CONSUMERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

The National Association of Gas Consumers ("NAGC") respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in this case. Petitioners have consented to NAGC's filing of this brief. The consent of the respondent was requested but refused.

Statement of Interest

NAGC is a nonprofit organization representing municipally-owned and operated gas distribution systems located throughout the United States. The Association through its direct and affiliate members represents approximately 200 systems. NAGC members either purchase natural gas or rely upon transportation service, or obtain both, from natural gas companies regulated by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act of 1938, 15 U.S.C. §§ 717, *et seq.*, a companion statute to the Federal Power Act of 1938, 16 U.S.C. § 791, *et seq.*[1]

NAGC members, as municipally-owned electric and natural gas distribution systems, compete at the retail level with investor-owned utilities which typically control essential transmission facilities. As such, the NAGC and its members, are directly affected by the court of appeals' decision, and have a unique perspective and interest which will aid this Court in its consideration of the issues herein.

Reasons For Granting Leave

This case involves an important decision involving the application of the Federal Antitrust laws, in particular § 2 of the Sherman Act, 15 U.S.C. § 2, to an industry subject to regulation by the Federal Energy Regulatory Commission. The NAGC members are de-

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[1] Federal Power Act and Natural Gas Act are *in pari materia* and relevant provisions of each are construed interchnageably. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981); Permian Basin Area Rate Cases, 390 U.S. 747, 820-821 (1968); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

pendent on interstate gas pipeline systems for the transportation or purchase of their wholesale gas supplies for their distribution systems. The United States Court of Appeals for the First Circuit held that a utility which is regulated by the FERC at the wholesale level and by state regulatory agencies at the retail level, is immune from liability under § 2 of the Sherman Act with respect to a price squeeze imposed by it on its wholesale customers. As demonstrated by the brief attached hereto, the dual regulation immunity decision should be reviewed, not only because it conflicts with decisions in the Eighth, Seventh and Second Circuits dealing with electric utilities, but because its rationale would also appear to apply to natural gas companies subject to FERC regulation. As such, members of the NAGC could be denied important protection for fair and equal competition with their pipeline suppliers presently available under § 2 of the Sherman Act.

Second, the First Circuit's decision adopts a novel narrow definition of monopoly power, which would have the effect of further immunizing interstate gas pipelines from accountability under the Sherman Act and thereby exempting such FERC-regulated utilities from the essential facilities doctrine. In essence, the court ignored the admitted monopoly power of the defendant over transmission and at the retail level. The jury's verdict of monopoly control under § 2 was replaced by a legal ruling that a plaintiff under the antitrust laws must show monopoly control by the defendant at the production level, thereby expanding the relevant geographic market to encompass all potentially accessible production sources, and thereby insuring immunity from § 2. Thus, antitrust plaintiffs

subject to an essential facility must now prove monopoly power at the producer or generational level regardless of admitted monopoly control over the facilities. This finding jeopardizes all municipally-owned utilities that are dependent on essential facilities to receive energy supplies from outside sources. The court's holding on the requisite proof for monopoly power creates an exception to the Sherman Act which is unprecedented and conflicts with many other circuit decisions.

NAGC, as a representative of municipally-owned utilities, is directly affected by the lower court's decision. Acceptance of NAGC's brief *amicus curiae* will lend a unique perspective and information to this court in considering the issues herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, NAGC respectfully requests that the following brief *amicus curiae* in support of petitioners be accepted for filing.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF GAS CONSUMERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A *WRIT OF CERTIORARI*

INTEREST OF *AMICUS CURIAE*

The National Association of Gas Consumers ("NAGC") is a nonprofit organization representing municipally owned and operated gas distribution systems located throughout the United States. The Association through its direct and affiliate members represents approximately 200 systems. These gas sys-

tems purchase natural gas and/or rely upon transportation service from natural gas companies regulated by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act of 1938, 15 U.S.C. §§ 717, a companion statute to the Federal Power Act of 1935, 16 U.S.C. §§ 791, et seq.[1]

The members of NAGC are dependent on interstate gas pipeline systems for transportation or purchase of their wholesale gas supplies needed for their distribution systems. Many of the municipal systems purchase firm requirements gas supplies from interstate pipelines, which compete with them for retail customers. Since the interstate pipelines are subject to dual regulation by FERC and the states, similar to Boston Edison Company, the principles of the decision by the First Circuit Court of Appeals, immunizing these sales from price squeeze consideration under § 2 of the Sherman Act also applies to these gas systems. Further, reasonable access to the interstate pipeline facilities either for the purchase of firm requirements gas or for access to other competitive supplies of natural gas, is essential for these small municipal systems to continue to provide the lowest cost supply of natural gas to their communities. The decision of the court of appeals in narrowing the definition of monopoly power below applicable precedents, could improperly immunize the interstate pipeline industry from the essential facilities doctrine, contrary to the public interest.

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[1] Federal Power Act and Natural Gas Act are *in pari materia* and relevant provisions of each are construed interchangeably. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981); Permian Basin Area Rate Cases, 390 U.S. 747, 820-821 (1968); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

ARGUMENT

The decision below takes the case from the jury on the strength of false premises springing from a misperception of rate regulation as a panacea for price squeeze liability under Section 2 of the Sherman Act. This antitrust immunity theory is advanced on two interrelated grounds. First, the court of appeals finds as fact that a vertically integrated utility whose rates are subject to regulation at both the retail and wholesale levels is so "completely regulated," as to be forestalled from impairing competition by price squeezing wholesale customers who compete with it for retail sales. 915 F.2d at 19, 28. Secondly, the court exempts such dual regulated utilities from the essential facilities doctrine, by rejecting acknowledged evidence of the defendant's transmission monopoly and barriers to reasonable access thereto. 915 F.2d at 29-31. The latter basis for the decision substitutes for the jury's finding an absolute requirement that a price squeeze plaintiff show monopoly control by the defendant at the wholesale generation (production) level, under a mandatory requirement that the relevant geographic market be one which must encompass all potentially accessible generation sources. 915 F.2d at 29-30.

These flawed conclusions by the First Circuit are contrary to this Court's precedents, in conflict with decisions of other circuit courts of appeal, and if allowed to stand would in practical application afford dual regulated utilities opportunities to injure competition and drive up consumer prices. Accordingly, as elaborated upon in the discussion below, NAGC urges that *certiorari* be granted in the instant case.

I. THE FACT OF REGULATION DOES NOT ELIMINATE OR REDUCE THE ANTICOMPETITIVE POTENTIAL OF PRICE SQUEEZE, IT ENHANCES IT

The primary reason for the lower court's erroneous conclusion that regulation *per se* eliminates the practical possibility of an unlawful price squeeze is its total misunderstanding of the role of regulation in a price squeeze situation. Regulation does not impose any substantial limitation on a utility's power to set and manipulate its rates for anticompetitive purposes. Rather, the existence of dual regulation increases a utility's ability to manipulate.

The decision asserts that the law permits a utility to only recover its costs and earn a reasonable profit. 915 F.2d at 25-26. From this premise, it goes on to conclude: "An integrated utility's prices are likely to squeeze independent distributors who buy from it at wholesale only if those distributors operate less efficiently, *i.e.*, at higher costs." *Id.* at 26. However, as will be shown hereinafter, the limitations of regulation on a utility's price squeeze capabilities are so small that a distributor could operate considerably more efficiently than its wholesaler and still be undercut by that wholesaler to an almost unlimited degree.[2]

First, the proposition that the law does not permit the utility to recover more than its costs plus a rea-

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[2] The court also ignored utilities' ability to exploit the wholesale/retail regulatory gap by determining the timing and amount of their rate filings. City of Kirkwood v. Union Electric Company, 671 F.2d 1173, 1177-78 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); City of Mishawaka v. Am. Elec. Power Co., 616 F.2d 976, 983-84 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); Cities of Anaheim v. Southern California Edison Co., 1990-2 Trade Cases ¶ 69,246 at 64,900 (C.D. Cal. 1990).

sonable profit is untrue. The inability of regulators to control prices, and the consequent importance of antitrust remedies, is well established:

> Yet insensitivities, gaps, or delays in regulation may enable the regulated monopolist to obtain more than competitive returns[43] or improperly to prejudice actual or potential competition in the regulated market or in a related market.[44] Such results at the hands of a regulated monopolist are traditional concerns of § 2.

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[43] *See generally* S. Breyer, Regulation and Its Reform (1982); T. Moore, The Effectiveness of Regulation of Electric Utility Prices, 36 S. Econ. J. 365 (1970)

[44] *See* Ch. 7D.

P. Areeda & H. Hovenkamp, Antitrust Law ¶ 518.3d (Supp. 1989). FERC price regulation clearly does not limit a utility to collection of actual costs plus a reasonable profit. FERC regulation of wholesale prices of utilities such as Edison is based exclusively on estimated costs for a hypothetical future test year. These prices are then applied for what can be a substantial period of time. For example, in this case Edison's rates to the Towns for the entire 1985 to 1990 period were based on one estimated test period set of data. The FERC itself has acknowledged that this estimated cost policy gives a utility the incentive and capability to manipulate its estimates to recover more than its actual costs. *Public Service Company of New Mexico*, Opinion No. 203, 25 F.E.R.C. ¶ 61,469 at 62,055 (1983).

Further, it may deliberately allow prices in excess of costs. For example, for the period 1971 through 1986 the Commission gave all gas pipelines the benefit of a "short supply" declaration pursuant to the Revenue Act of 1971. This permitted the pipelines to keep all the benefits of investment tax credits created pursuant to that Act. This also constituted a specific allowance for the pipeline industry to recover more than their costs, plus a reasonable return. Ratemaking Treatment of Investment Tax Credit for Natural Gas Pipeline Companies, Order No. 440, 33 F.E.R.C. ¶ 61,295 (1985).

But even more important to the ultimate impact of regulation on price squeeze is the issue of rate design and cost allocation. Once a utility has determined its overall "estimated cost" it must allocate those costs as between its various wholesale and retail customers and employ a "rate design." The Commission's policy on rate design is "the Commission must find the rate design filed by a utility to be unjust, unreasonable or otherwise unlawful in order to set aside the filed rate design and order the utility to adopt another rate form even though another rate design may be even better than the one filed by the utility." *New England Power Company*, Opinion No. 352-A, 54 F.E.R.C. ¶ 61,055, *slip op.* at 2 (January 24, 1991).

Thus, pursuant to the FERC's ratemaking policies, a utility has a broad number of estimating, rate design and allocation methodologies from which it could choose in filing and then collecting a rate for a long period of time. If it desires to put any particular customer in a price squeeze, it simply selects the methodology which will raise the cost and billing allocations to that customer or the entire wholesale

customer class and lower it to other customers or the entire retail customer class. Contrary to the lower court's decision, no distributor, no matter how efficient, stands a chance against a utility with an anticompetitive intent.

Other circuit courts of appeal have come to the correct conclusion as to the relationship between price squeeze and dual regulation. Indeed, the court of appeals itself stated (915 F.2d at 28-29) that its holding was in direct conflict with the Seventh Circuit's decision affirming a price squeeze judgment against an electric utility in *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (As to "an industry subject to both federal and state regulation . . . we do not believe that that circumstance justifies an antitrust exemption . . . . "). The court below also acknowledged that its "reasoning and analysis differ [ ] significantly from that in" a number of other opinions, including the Eighth Circuit's decision in *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), and the Second Circuit's decision in *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981). *Id.* After analyzing this Court's decisions, including *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) and *FPC v. Conway Corp.*, 426 U.S. 271 (1976), and discussing the limitations on federal and state ratemaking authority, the Eighth Circuit held that "a municipality's price squeeze claim is cognizable under the antitrust laws." *City of Kirkwood* at 1177 n.8.

II. THE DECISION BELOW RELATING TO MONOPOLY CONTROL CONFLICTS WITH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUIT COURTS OF APPEALS ON THE ESSENTIAL FACILITIES DOCTRINE

This Court has established that the "strategic dominance in the transmission of power" possessed by a utility regulated under the Federal Power Act is relevant to the issue of monopoly power under Sherman Act § 2. *Otter Tail Power Company v. United States*, 410 U.S. 366, 377-79 (1973). The court of appeals holds to the contrary by finding that the plaintiffs "failed to show that Boston Edison possessed monopoly power in the relevant market," while also recognizing:

> In this case, it is undisputed that Boston Edison has a (lawful) monopoly at one level of the electricity industry, namely transmission, for a given area normally can support only one transmission system, *see, e.g.*, Meeks, 72 Colum. L. Rev. at 87, and Edison owns the transmission grid covering the area that includes Concord and Wellesley.

915 F.2d at 29.

This unwillingness by the court of appeals to permit the conceded transmission monopoly (as well as retail monopoly) to be used as part of a monopolization claim is clearly in conflict with *Mishawaka*, 616 F.2d 976, and cases decided by the D.C., Third, Fourth, Eighth and Ninth Circuits.[3] The court of appeals ins-

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[3] Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); Structure Probe, Inc. v. Franklin Institute, 450 F. Supp. 1272, 1286 (E.D. Pa. 1978), *aff'd*

ists upon (1) proof of monopoly power over production in (2) a geographic market broad enough to encompass all production sources potentially accessible through Edison's transmission system, all to the further disregard of barriers to entry erected by Edison. 915 F.2d at 29, 30. This holding itself warrants review since it creates a judicial exemption from the antitrust laws for retail and transmission monopolists.

The holding of the court of appeals refusing to recognize the admitted transmission monopoly clearly conflicts with the holdings of other courts as to essential facilities doctrine. *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 592, 594 (1985) (Denial of access found despite defendant's offer to grant access if plaintiff would accept 12.5% split of multi-mountain lift ticket revenues); *Consol. Gas Co. of Florida v. City Gas Co.*, 880 F.2d 297, 299 (11th Cir. 1989), *aff'g* 665 F. Supp. 1493, 1512 (S.D. Fla. 1987) (Refusing to transport gas except at prices in excess of cost amounted to a refusal to deal); *Woods Exp. and Pet. Co. v. Al. Co. of America*, 438 F.2d 1286, 1301, 1308-09 (5th Cir. 1971) (Pipeline's refusal to transport natural gas unless an overriding royalty was paid held equivalent to be an absolute refusal); *City of Chanute v. Kansas Gas & Electric Company*, 564 F. Supp. 1416, 1419, 1423-24 (D. Kan. 1983), aff'd,

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mem., 595 F.2d 1214 (3d Cir. 1979); Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 397 (4th Cir. 1974); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983). *See also*, Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986).

754 F.2d 310 (10th Cir. 1985) (Refusal to wheel unless customer agreed to new contract that provided increased rates treated as a refusal to wheel).

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

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